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IN THE
COURT OF APPEALS OF INDIANA

SCOTT MORRIS, II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1016
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0402-FA-26609

October 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Scott Morris, II pleaded guilty to two counts of child molesting, both class A felonies. Upon appeal, he challenges the sentences he received for those convictions, presenting the following restated issues for review:

1. Do Morris's sentences violate the principles announced in *Blakely*?

2. Did the trial court overlook significant mitigating circumstances in sentencing Morris?

We affirm.

On February 18, 2004, Morris was charged with three counts of class A felony child molesting. The alleged victim was the five-year-old daughter of the woman with whom Morris lived at the time. The charges alleged that Morris had placed his penis in the child's mouth and inserted his finger and penis into her anus. On August 11, 2004, Morris entered into a plea agreement whereby he agreed to plead guilty to two counts of class A felony child molesting in exchange for the State's agreement to dismiss the remaining charge. The plea was an open one, leaving the parties free to argue the length of his sentence, the executed portion of which would be capped at thirty years.

At the sentencing hearing on September 10, 2004, the trial court found two aggravating factors: the defendant occupied a position of trust with the victim and there were multiple molestation acts committed upon the victim. After failing to find any mitigating factors, the court sentenced Morris to thirty-five years on each count, with five years of each sentence suspended and the sentences to run concurrently.

On February 22, 2007, Morris, pro se, filed a petition for post-conviction relief, challenging his sentence as manifestly unreasonable. A short time later, a public defender

was appointed to represent Morris in his appellate endeavors. On October 12, 2007, pursuant to Ind. Post-Conviction Rule 2(1), counsel filed on Morris's behalf a petition seeking permission to file a belated notice of appeal for the purpose of initiating a direct appeal, and further asked the court to hold in abeyance Morris's pro se petition for post-conviction relief. The court granted the petition for permission to file a belated appeal and this appeal ensued.

1.

On June 24, 2004, the Supreme Court of the United States decided *Blakely v. Washington*, 542 U.S. 296 (2004). *Blakely* significantly changed the landscape with respect to criminal sentencing matters, most notably prohibiting a trial court from enhancing a sentence based on additional facts unless those facts are either (1) a prior conviction; (2) found by a trier of fact beyond a reasonable doubt; (3) admitted by the defendant; or (4) found by the sentencing judge after the defendant has waived rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and consented to judicial factfinding. *Blakely v. Washington*, 542 U.S. 296. Morris contends his sentence violates *Blakely* because the aggravators found by the trial court did not fit within any of those categories. The State counters that *Blakely* does not apply here. We conclude that even assuming *Blakely* does apply, the two aggravators cited by the trial court do not violate its mandate. Thus, Morris in not entitled to reversal on this issue.

The trial court cited Morris's position of trust with respect to the victim as an aggravating factor. Morris claims this fact was not established in any of the four ways required by *Blakely*. We disagree. At the guilty plea hearing, Morris admitted that the two molestations to which he was pleading guilty occurred while he was babysitting the five-

year-old victim. By admitting he was the victim's babysitter at the time, Morris admitted that he was in a position of trust with her. *See, e.g.*, *Trusley v. State*, 829 N.E.2d 923 (holding that the trial court properly considered the defendant's position of trust as an aggravator where the defendant admitted at the sentencing hearing that she was the victim's day care provider). The use of this aggravator did not violate *Blakely*.

Morris also contends the trial court violated *Blakely* in citing as an aggravator "that there were two acts at the same time[.]" *Transcript* at 21. Although it is not entirely clear, we assume the trial court's comment, and thus this aggravator, alludes to the fact that the molestation of this victim included multiple acts. Assuming this to be the case, such was not improperly established under *Blakely* because Morris admitted he inserted his penis into the victim's anus, and he also admitted he inserted his penis into her mouth. There is no error here.

2.

Morris contends the trial court overlooked significant mitigating circumstances. Effective April 25, 2005, our legislature amended Indiana's sentencing statutes to replace presumptive sentences with advisory sentences. Because Morris committed his crimes before the amendment's effective date, the presumptive sentencing scheme applies. *See Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007). When evaluating challenges under the presumptive statutory scheme, it is well established that sentencing decisions lie within the trial court's discretion. *Williams v. State*, 861 N.E.2d 714 (Ind. Ct. App. 2007). Those decisions are accorded great deference on appeal and will be reversed only for an abuse of discretion. *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007), *trans. denied*. The broad discretion

vested in the trial court includes the discretion to determine whether to increase the presumptive sentence. *Jones v. State*, 807 N.E.2d 58 (Ind. Ct. App. 2004), *trans. denied*. When, as here, the trial court imposes an enhanced sentence, it must: (1) identify significant aggravating and mitigating circumstances, (2) state the specific reasons why each circumstance is aggravating or mitigating, and (3) evaluate and balance the mitigating circumstances against the aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. *Trowbridge v. State*, 717 N.E.2d 138 (Ind. 1999). In this case, Morris challenges only the failure to find three proffered mitigating circumstances: i.e., (1) Morris's guilty plea, (2) the fact that he had no criminal history, and (3) his remorse.

We agree that Morris's guilty plea is a valid mitigator. Our Supreme Court has stated that trial courts should be "inherently aware of the fact that a guilty plea is a mitigating circumstance." *Francis v. State*, 817 N.E.2d 235, 237 n.2 (Ind. 2004). This is not to say, however, that it is inherently considered a *significant* mitigating circumstance and thus it is error to omit it. *Francis v. State*, 817 N.E.2d 235. To support an allegation that the trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating factor was both significant and clearly supported by the record. *Matshazi v. State*, 804 N.E.2d 1232 (Ind. Ct. App. 2004), *trans. denied*. It is well established that a guilty plea is not significantly mitigating where the defendant has received a substantial benefit from it and thus that the decision to plead guilty is merely a pragmatic one. *See Wells v. State*, 836 N.E.2d 475 (Ind. Ct. App. 2005), *trans. denied*. In pleading guilty, Morris benefited substantially from the dismissal of one class A felony charge and received a thirty-year cap

on his executed sentence. Thus, although the plea did indeed save money and time for the State and spare the victim from the ordeal of testifying at a trial, the trial court would be justified in determining that Morris's decision to plead guilty appears to have been to a large extent pragmatic, and thus entitled to minimal mitigating weight in determining an appropriate sentence.

Morris next contends the trial court erred in failing to find that his lack of criminal history was a significant mitigating circumstance. Trial courts are not required to give significant weight to a defendant's lack of criminal history. *Bunch v. State*, 697 N.E.2d 1255 (Ind. 1998). That is especially so where, as here, the lack of prior criminal charges does not signal an absence of criminal behavior. There was significant evidence that Morris molested the victim multiple times over a period of time. He waited until her mother left the child in his care before molesting the young girl, and he once even took the child with him to buy products that would aid him in committing a subsequent molestation. Morris, however, would have us consider only prior convictions in assessing his history of criminal activity. He argues, "if a mere record of arrests is not sufficient to support an enhancement based on criminal history …, a child's uncorroborated allegations at a sentencing hearing must be even more insufficient." *Appellant's Reply Brief* at 7 (internal citation to authority omitted). By this, we assume Morris is arguing that if a trial court may not consider mere arrests to support finding criminal history as an aggravator, which in turn supports a sentence enhancement, then it follows that the court also may not consider uncharged crimes in deciding whether to find a lack of criminal history as a mitigator. The flaw in this reasoning lies in equating the use to which the two are put, i.e., equating sentence enhancement with sentence reduction.

Our Supreme Court has stated:

> Charges that do not result in convictions may be considered by the sentencing court in context, but something more than mere recitation unaccompanied by specific allegations should be shown. We have held that "*[i]n order to enhance a criminal sentence based*, in whole or in part, *on the defendant's history of criminal activity*, a sentencing court must find instances of specific criminal conduct shown by probative evidence to be attributable to the defendant. A bare record of arrest will not suffice to meet this standard."

McElroy v. State, 865 N.E.2d 584, 591 (Ind. 2007) (quoting *Tunstill v. State*, 568 N.E.2d 539, 544 (Ind. 1991) (emphasis supplied).

In this case, there was probative evidence that the molestations went significantly beyond the acts of which Morris was convicted. We reiterate that the question is not whether the trial court erred in citing criminal history as an aggravator supporting an enhanced sentence, but whether it erred in failing to cite his lack of criminal activity as justification for exercising leniency. In the final analysis, in view of the calculated, serial nature of the molestations over a period of time, the trial court was not bound to regard Morris as someone who had previously refrained from illegal behavior.

Lastly, Morris contends the trial court erred in failing to find his remorse as a mitigating circumstance. The trial court was able to observe Morris first-hand at the sentencing hearing, and on that basis alone is a much better judge than we are of his demeanor and the sincerity of his expression of remorse. *See Wilkie v. State*, 813 N.E.2d 794 (Ind. Ct. App. 2004), *trans. denied*. Moreover, we note that at the sentencing hearing, Morris claimed he did not know how the molestations started. Notably, in explaining that he did not know why he did it, he claimed, "I don't know if it was the evil spirits in the house or if it was the voices in my head that made me do it[.]" *Transcript* at 13. These comments might

fairly be interpreted as a failure to fully accept moral responsibility for his actions. As such, the trial court did not abuse its discretion in discounting the significance of Morris's claim of remorse.

We conclude the trial court did not err in failing to find as significant the mitigating factors proffered by Morris. Morris does not challenge the sentence in any other way.

Judgment affirmed.

DARDEN, J., concurs.

BARNES, J., concurs in result with separate opinion.

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	)	
Appellee-Plaintiff.	)	

BARNES, Judge, concurring in result

I respectfully concur in result only. I believe we ought to squarely address Morris's interesting argument regarding Blakely and the Due Process Clause of the 14th Amendment. To say that Morris admitted to the facts underlying the aggravators found by the trial court does not answer his argument that those aggravators were improper because he had no prior notice that the trial court could or would rely upon them.

Specifically, Morris notes that the aggravating circumstances here—being in a "position of trust" with the victim and committing two acts at the same time—are not explicitly enumerated by statute. Thus, Morris contends, when the trial court enhanced his sentence in reliance on these factors, it essentially created a common-law crime, with these two factors as additional "elements" to the base offense of Class A felony child molesting.

Morris claims he lacked notice of these additional "elements," in violation of the 14th Amendment's Due Process Clause. This argument necessarily is based on Blakely's holding that there is no real distinction between elements of an offense and sentencing factors that serve to increase a sentence above the "statutory maximum"—at least for purposes of the Sixth Amendment's jury requirement. See Blakely v. Washington, 542 U.S. 296, 306-07, 124 S. Ct. 2531, 2539 (2004).

Some commentators have noted the potential for due process concerns with the way sentencings were conducted in the past in light of Blakely and its forerunner, Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). As one noted professor said,

> before Blakely and Booker recast the Supreme Court's reoriented sentencing jurisprudence toward just the Sixth Amendment's jury trial right, it was clear that the "watershed" rule . . . established in Apprendi was about a lot more--particularly, what the Due Process Clause of the Fifth and Fourteenth Amendments and the notice provision of the Sixth Amendment might mean for modern sentencing systems.

Douglas A. Berman, Beyond Blakely and Booker: Pondering Modern Sentencing Process, 95 J. Crim. L. & Criminology 653, 676-78 (Spring 2005). Indeed, Apprendi did contain much language suggesting that due process requires the government to provide advance notice of factors it may rely upon to increase a defendant's sentence. The Supreme Court observed:

> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, ... stated with

> such certainty and precision, that the defendant ... may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly ... and that there may be no doubt as to the judgment which should be given, if the defendant be convicted." The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.

Apprendi, 530 U.S. at 478, 120 S. Ct. at 2356 (citation omitted). In a separate concurrence joined by Justice Scalia, Justice Thomas stated: "In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime . . . ." Id. at 500, 120 S. Ct. at 2368 (Thomas, J., concurring).

Not many courts, if any, have squarely addressed the possible due process implications of Apprendi and Blakely. One member of the Arizona Supreme Court has expressed due process concerns about relying on aggravators of which the defendant had no prior notice to increase a sentence. In Arizona, this is called a "catch-all" sentencing factor:

> But even when a jury trial is afforded, a serious Fourteenth Amendment due process problem is presented if the "catch-all" is the only factor that makes a defendant eligible for a sentence beyond the presumptive term. . . . A defendant has no notice, in advance of the conduct that exposes him to jeopardy for the "aggravated crime," of precisely what is proscribed under the critical "catch-all" element. It is as if the criminal code had one punishment for theft, and another for aggravated theft, the former consisting of theft simpliciter and the latter consisting of the elements of the theft plus "anything else the court or the state may someday later find relevant."
>
> A statute that fails to provide fair notice of precisely what acts are forbidden "violates the first essential of due process of

> law." When criminal penalties are at issue, "[a]ll are entitled to be informed as to what the State commands or forbids." Moreover, by failing to provide an explicit standard for a sentencing judge, the "catch-all" element would also seem to offend due process by allowing for arbitrary and discriminatory enforcement.

State v. Price, 171 P.3d 1223, 1228-29 (Ariz. 2007) (Hurwitz, J., concurring) (citations omitted).

Ultimately, however, the majority opinion in Apprendi only held the following: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63. Blakely built upon Apprendi by further defining what "statutory maximum" means: "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303, 124 S. Ct. at 2537. Blakely also said that it was focused upon "the need to give intelligible content to the right of jury trial." Id. at 305, 124 S. Ct. at 2538. In other words, despite some hints and suggestions in Apprendi and Blakely regarding due process, ultimately their holdings were limited to the Sixth Amendment right to a jury trial.

Furthermore, I acknowledge that our supreme court allowed defendants to "liberally" raise Blakely claims on direct appeal, even when they had made no Sixth Amendment objection at the time of sentencing. See Smylie v. State, 823 N.E.2d 679, 690 (Ind. 2005).[1]

[1] As a side note, I disagree with the State that Morris is precluded from raising any Blakely argument by our supreme court's decision in Gutermuth v. State, 868 N.E.2d 427 (Ind. 2007). In that case, the court held that where a defendant's time for filing a direct appeal had expired before Blakely was decided but the defendant successfully sought permission to file a belated appeal after Blakely was decided, Blakely did not apply

Clearly, however, our supreme court only was contemplating that defendants could raise issues directly decided by Blakely, which would be the right to have a jury determine the existence of aggravating circumstances under the presumptive sentencing scheme. As this court observed in another case, "We do not believe . . . that Smylie gave defendants carte blanche to raise peripheral Blakely issues, [including lack of notice of aggravators], where they did make admissions to aggravating circumstances that were sufficient to support an enhanced sentence." Sullivan v. State, 836 N.E.2d 1031, 1037 (Ind. Ct. App. 2005).

It may be that having to provide prior notice of the aggravators the government intends to use to enhance a sentence above the "statutory maximum" would be the next logical step from Blakely. But the fact is Blakely itself did not take that step. Neither did Apprendi, although Justice Thomas apparently wished that the majority had done so. I am not prepared to expand the holdings of Blakely and Smylie here, given the procedural posture of this case and Morris's failure to make any due process objection at the time of sentencing. However, Morris does provide food for thought. In any event, future cases in Indiana will not face this predicament because of the legislature's decision to replace "presumptive" with "advisory" sentences and, therefore, avoid Blakely implications. See Anglemyer v. State, 868 N.E.2d 482, 487-88 (Ind. 2007). Further development of this issue likely will not take place in Indiana.

For these reasons I concur in the result reached by the majority in affirming Morris's

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retroactively to the defendant's case. See Gutermuth, 868 N.E.2d at 434-35. Key to that holding was that the court's conclusion that a case is "final" for retroactivity analysis when the original time for filing a direct appeal has expired. Id. Here, by contrast, Morris was sentenced and his original time for filing a direct appeal expired after Blakely was decided, but he later was given permission to pursue a belated appeal.

sentence.

Blakely would have been available to Morris if he had taken a timely appeal and it should be equally available in this belated appeal.